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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 74-635

UNITED STATES OF AMERICA, *Petitioner,*

vs.

ROSE WONG, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Rose Wong, the respondent in the above proceeding, files this response to the government's petition for a writ of certiorari, at the invitation of the Court.

The government, by its petition for a writ of certiorari here, would drag the nation back to the period before Watergate. The government would ignore the cleansing, therapeutic effect of the judicial and Congressional process which brought to an inglorious end the assertion of unbridled, arrogant power of the government over its people. The government, in its petition, rejects the fundamental fairness which the Fifth, Sixth, and Ninth Circuits require the governors to maintain toward the governed.

1. Fairness is what is explicitly at stake in the grant or denial of certiorari in this case. The government, accumulating evidence of the federal offense of obstruction of state and local law enforcement (18 U.S.C. 1511), had "testimony of two cooperating undercover San Francisco police officers that . . . [respondent] had paid them bribes, and arranged for future payments. . ." (Opinion of the Court of Appeals, below, footnote 2). Respondent, thus a "prospective defendant" (id.), was summoned before a grand jury and, without warning of her right not to be required to incriminate herself,[1] was asked questions which the government attorney knew she would have to answer untruthfully or confess to a crime.

Respondent, and her questioner, were exactly in the position eloquently described by the Court of Appeals in *United States v. Mandujano* (1974) 496 F.2d 1050. If the questioning attorney, that court said, "actually anticipated an answer, he must have known that the response would require Mandujano to confess to a crime or commit perjury," hence the questioner was "primarily baiting Mandujano to commit perjury." Under such circumstances, Mandujano's "only 'safe harbor' was to remain silent—a right of which the government failed to inform him."

Respondent, as did Mandujano, had a due process right not to be baited into committing perjury.

[1]The government necessarily does not challenge the finding by the district court that respondent, due to her lack of facility with the English language, did not understand the attempted warning against self-incrimination tendered to her.

It is almost inconceivable, in days following the recent national trauma, that the government would urge this Court to proceed in violation of such fundamental concepts of fairness. The British publishers of *Watergate*[2] correctly describe their book as making clear that the Nixon White House "bizarre catalogue of 'dirty tricks' was the almost inevitable product of an Administration that valued its own survival above loyalty to principles or to a system of government."

Unhappily ready to resume disloyalty to a principled order, the government now urges the Fifth Amendment be treated with as much disrespect as the Fourth Amendment suffered from that Administration. But that course is not the law and is not in the interest of the country. The Fifth Amendment, said the court in *Mandujano*, supra, "must always be as broad as the mischief against which it seeks to guard." The Court of Appeals below, and the several courts of appeals whose opinions were its progenitors (infra), found the due process clause of that Amendment to be broad enough to protect respondent against the fundamental unfairness the government sought to inflict upon her.

The government argues, in its petition, that respondent, summoned to appear before the grand jury, was not under that compulsion to self-incrimination that assertedly must exist to bring Fifth Amendment protection into operation, to require *Miranda*[3] warning prior to testifying. But this ignores at once estab-

[2]Andre Deutsch, 105 Great Russel Street, London, WC1.

[3]*Miranda v. Arizona* (1966) 384 U.S. 436.

lished law on what constitutes "custodial interrogation" and the reality of the position of an adverse witness before a foreboding, hostile grand jury.

The most significant hallmark of identification of a "custodial interrogation," hence one requiring a Miranda warning, is "whether or not the focus of the investigation has finally centered on defendant." *Brooks v. Beto* (5th Cir. 1972) 468 F.2d 1284.

Respondent's status before the grand jury admits of no possible doubt. The government cannot and does not question the determination of the Court of Appeals that "she was a target of the Grand Jury's investigation and likely to be indicted." Her testimony was elicited in every sense under the most hazardous compulsion.

The government seeks to distinguish one who is a putative or virtual defendant when called as a witness before a grand jury, from one questioned in "custodial police interrogation," which the government acknowledges to be "inherently coercive and difficult to supervise by neutral authority." This is nothing like "a grand jury setting." the government pleads, "where questioning takes place before 23 private citizens, under the supervision of a presiding judge," and where a witness can sometimes obtain a continuance.

The government, by this benign estimate of the comforts assertedly characteristic of a compulsory grand jury appearance by a virtual defendant, on whom an inquiry has centered, deals with form and not substance. Such a witness knows he (often, and in this case, she) is in deep trouble with the federal

government, a huge and intimidating entity. Whatever else she knows, she knows the function of a grand jury is to start a criminal proceeding, to indict. No "presiding judge," or any judge, is in the secret, private room to which she is taken, nor may her lawyer enter. The "23 private citizens" are apparent allies of the prosecutor who questions her, and necessarily appear as multiple oppressors, certainly not guardians of her liberty.

To such a witness, the experience cannot be less than terrifying, the setting one that cries out for the minimum exercise of fundamental fairness represented by a *Miranda* warning. This is the sound basis for the decisions of the district court and the Court of Appeals below, and for comparable decisions in the Fifth[4] and Sixth[5] Circuits. The government's unbecoming assault in its petition upon decency, fairness and equity must be rejected. The vitality of due process, upon which the decision of the Court of Appeals expressly rests, demands no less.

2. The government, in its petition, equally complains of the remedy found appropriate by the Court of Appeals for failure effectively to warn her—suppression of respondent's testimony. Freely calling on the exacerbating accusation that the remedy furnishes respondent with "a license to commit perjury," the government protests that even if its conduct were un-

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[4] *United States v. Mandujano,* supra; *United States v. Rangel* (1974) 496 F.2d 1059.

[5] *United States v. Luxemberg* (1967) 374 F.2d 241; *United States v. Fruchtman,* 282 F.Supp. 534 (N.D. Ohio 1968), cert. den. 400 U.S. 849.

fair, even if effective warnings were required but omitted, the deterrent of suppression is not warranted because the Court of Appeals "found no 'bad faith'" on the part of the prosecutor.[6]

But the government's protests evade the point made by the Fifth Circuit and by the court below. That is, without reaching bad faith or "improper motives," as the court put it in *Mandujano,* supra, the courts correctly recognize that to make a likely defendant a grand jury witness, then ask her the questions the government knows must produce a confession or perjury, without effective warning of a constitutional right not to answer, constitutes government misconduct not to be condoned any more than extracting confessions with a nightstick.

The question, said the court in *Mandujano,* supra, is "one of the supervision of the conduct of government representatives in the interest of fairness." That court properly held its duty to be to deter "prosecuting officers from bringing a putative or virtual defendant before the grand jury, for the purpose of obtaining incriminating or perjurious testimony."

The court below said much the same thing: ". . . [T]he government having employed a procedure calculated to exploit [respondent's] lack of understanding [of English], it runs the risk of a subsequent determination that its curative procedures were inadequate and the due process violation undissipated."

[6]What the Court of Appeals said, in the final footnote to its opinion, was "We do not intimate that the government acted in bad faith."

Suppression is the only effective remedy, and is the only effective deterrent to such blatantly unfair and improper conduct. Prosecutors will not be deterred from such procedures if they know the worst they will suffer is inability to use a confession they don't have but might extract, but will have the opportunity to add a perjury count to the indictment or information they already have in preparation for the hapless witness.

The decision below interferes not one whit with the effective functioning of the grand jury. It insists only that the warning, which the government itself purported to give, be effective. Having determined to give Rose Wong the warning, the government overreaches when it flays its own conduct as unnecessary, since it was simply wanting by its own original intention.

The eminently sound conclusion of the Court of Appeals, and those of its predecessors in the Fifth and Sixth Circuits, bring distinction to the federal judicial system, and invite confidence of the people in the integrity of their government. The petition for a writ of certiorari must be denied.

Dated, San Francisco, California,
February 20, 1975.

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